INDEX.

	Page.
Statement	1
Questions involved	5
Argument:	
I. Is the pay of the claimant, Rider, provided for under the appropriation made by the act of June 15, 1917 (40 Stat. 180), reading "Pay at $100 per month for enlisted men in training for officers of the Reserve Corps," or does the term "enlisted men in training," found in said appropriation, include only the enlisted men of the line of the Army?	6
II. The second question is: If Rider's pay was fixed by the proviso of the act of June 15, 1917, at $100 per month, what did said sum include?	13
III. The court below erred in holding that the provision of the act of June 15, 1917, establishing "pay at $100 per month for enlisted men in training for officers of the Reserve Corps," was extended by the provisions of the acts of July 24, 1917 (40 Stat. 243), and of July 9, 1918 (40 Stat. 485), until June 30, 1919	16

AUTHORITIES.

Act of May 11, 1908, 35 Stat. L. 109	3, 14
Act of July 18, 1914, 38 Stat. L. 514, 516	3, 18
Act of July 3, 1916, 39 Stat. L. 166, sec. 13	3
Act of May 18, 1917, 40 Stat. L. 82	3, 13
Deficiency Appropriation Act of June 15, 1917, 40 Stat. L. 182, 188	2, 5, 6, 13, 16
Act of July 24, 1917, 40 Stat. L. 243, 245	4, 16, 17
Act of July 9, 1918, 40 Stat. L. 845, 849	4, 6, 16, 18
House Report No. 67, 65th Cong., 1st sess	10
Report of Senate Committee on Appropriations	10

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
NELSON W. RIDER, APPELLEE.
No. 510.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Nelson W. Rider enlisted at Kansas City, Missouri, on November 22, 1917, for the Aviation Section, Signal Enlisted Reserve Corps, as a private, first class. He was called to active duty and directed to proceed to the School of Military Aeronautics, at Urbana, Illinois. He joined, under such orders, the said school on February 9, 1918, from which date he was in active service in the Aviation Section of the United States Signal Service Reserve Corps as an enlisted private, first class. After training and successive transfers to the various fields, he was assigned to duty that required him to participate in regular and frequent flights. His flight duties began at Taylor

Field, Alabama, on May 15, 1918, and his first flight was made on May 29, 1918. On September 13, 1918, the plaintiff was discharged from his status as an enlisted man, in order to allow him to accept a commission, and on September 14, 1918, he accepted a commission as second lieutenant in the Air Service Aeronautics in the Signal Corps, United States Army.

For his service during the period from May 12, 1918, to June 30, 1918, inclusive, Rider received pay at the rate of $100 per month. For service during the period from July 1, 1918, to September 30, 1918, Rider received the pay of an enlisted man, private, first class, at the rate of $33 per month, plus fifty per centum increase for aviation duty, amounting in all to the sum of $49.50 per month. Rider sued and made claim for the period from May 12, 1918, to June 30, 1918, for pay at the rate of $106 per month and fifty per centum increase thereon for said period, less the amount received by him at the rate of $100 per month for said period. Rider further claimed for the period between July 1, 1918, and September 13, 1918, inclusive, pay at the rate of $106 per month, plus fifty per centum increase for flight duty, less the amount which he had received in pay for said period.

The claim of Rider was based—

1. Upon the Deficiency Appropriation Act of June 15, 1917 (40 Stat. 182, 188), which Act provided as follows:

> For pay of enlisted men of all grades, including recruits, and pay at $100 per month

for enlisted men in training for officers of the Reserve Corps, $226,882,560.

2. Upon the Act of May 11, 1908 (35 Stat. 109) which provided:

> * * * Privates, first class, of * * * Signal Corps * * * eighteen dollars.

3. Upon the Act of July 18, 1914 (38 Stat. 514, 516), which Act was the Act that established the Aviation Section, which was to be a part of the Signal Corps of the Army, and provides:

> That 12 enlisted men at a time shall, in the discretion of the officer in command of the Aviation Section, be instructed in the art of flying, and no enlisted man shall be assigned to duty as an aerial flyer against his will except in time of war. Each aviation enlisted man, while on duty that requires him to participate regularly and frequently in aerial flights, or while holding the rating of aviation mechanician, shall receive an increase of 50 per centum in his pay.

4. The Act of July 3, 1916 (39 Stat. 166), being known as the National Defense Act. Section 13 of said Act, pages 174–175, provides for the Signal Service Corps, and sets forth:

> That the Secretary of War shall have authority to cause as many enlisted men of the Aviation Section to be instructed in the art of flying as he may deem necessary.

5. Upon the Act of May 18, 1917 (40 Stat. 82), which provided that—

> commencing June 1, 1917, and continuing until the termination of the emergency, all

> enlisted men of the United States in active service * * * whose base pay is $45 or more (shall receive) an increase of $6 per month.

6. Upon the Act of July 24, 1917 (40 Stat. 243), which Act permanently established and provided for the organization of the Aviation Section of the Signal Corps of the Army. Said Act, as relied on, sets out in section 8 (page 245):

> That all officers and enlisted men of the temporary forces of the Signal Corps, including the Aviation Section thereof provided for herein, shall be in all respects on the same footing as to pay, allowances, and pensions as permanent officers and enlisted men of corresponding grades and length of service in the Regular Army.

7. On the Act of July 9, 1918 (40 Stat. 845), the same being the General Appropriation Act for the support of the Army for the fiscal year ending June 30, 1919. The provision in said Act upon which Rider relied is set out on page 849, and is headed "Continuing the Appropriations for the Signal Service," reading as follows:

> That funds appropriated by the Act approved July twenty-fourth, nineteen hundred and seventeen, for the fiscal year nineteen hundred and eighteen, entitled "An Act to authorize the President to increase temporarily the Signal Corps of the Army and to purchase, maintain, manufacture, repair, and operate airships and make appropriations therefor, and for other purposes," and the

> funds appropriated for the Signal Service of the Army in the Act approved May twelfth, nineteen hundred and seventeen, entitled, "An Act making appropriations for the support of the Army for the fiscal year nineteen hundred and eighteen," and October sixth, nineteen hundred and seventeen, for the fiscal year nineteen hundred and eighteen and prior years entitled, "An Act making appropriations to supply urgent deficiencies, and so forth," are hereby made available until June thirtieth, nineteen hundred and nineteen.

The Court of Claims entered a judgment in favor of the claimant, Rider, on May 29, 1922, for the sum of $326.22. (R. 7.)

The findings of fact and conclusion of law are set out at pages 4, 5 of the record.

Notice of appeal was then given and the appeal allowed by the presiding judge.

The offices of the Comptroller General and the Secretary of War state that the decision in this case will control the rights of nearly twenty thousand claimants, involving a possible sum of eight to twelve million dollars.

QUESTIONS INVOLVED.

The questions involved in this case are threefold:

1. Is the pay of the claimant, Rider, being an enlisted man of the Aviation Section of the Signal Enlisted Reserve Corps, provided for under the Act of June 15, 1917 (40 Stat. 188), or does the term "enlisted men in training," found in said Act, include only the enlisted men of the line of the Army?

2. If it be held that the said Act of June 15, 1917, controlled the pay of Rider, does said pay of $100 per month cover all amounts to which he might have been entitled, provided said Act had not become a law, or whether said $100 was merely the base pay of Rider?

3. Was the pay of $100 per month for enlisted men in training for officers of the Reserve Corps appropriated in the Act of June 15, 1917, extended by the Act of July 9, 1918 (40 Stat. 845), and made available until June 30, 1919?

ARGUMENT.

I.

Is the pay of the claimant, Rider, provided for under the appropriation made by the Act of June 15, 1917 (40 Stat. 180), reading "Pay at $100 per month for enlisted men in training for officers of the Reserve Corps," or does the term "enlisted men in training," found in said appropriation, include only the enlisted men of the line of the Army?

The Act of June 15, 1917 (40 Stat. 188), is entitled "An Act making appropriation to supply urgent military and naval establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes."

Beginning on page 185 and running to page 201 there are a series of appropriations for the Military Establishment. In the body of the act these appropriations are arranged under different headings.

There are a number of different provisions for pay of enlisted men. The special appropriation which Rider claims is applicable to his case is set out on page 188. A careful reading of this section shows that the items of appropriations made on pages 188, 189, and 190 are all contained under the heading in the body of the act entitled "Pay of the Army." There are herein set out five special appropriations for the pay of enlisted men and two appropriations for the pay of retired enlisted men. Said appropriations begin with the heading "Pay of the Army," then follows a subheading "Officers of the Line," then "Enlisted men of the Line," then "Ordnance Department," then "Quartermaster Corps," then "Signal Corps," then "Medical Department." Under each of the last three subheadings there is an appropriation for the pay of enlisted men. Rider claims that he is entitled to the pay of $100 per month under the appropriation contained in the second subheading. This reads:

> Enlisted Men of the Line. For pay of enlisted men of all grades, including recruits, and pay at $100 per month for enlisted men in training for officers of the Reserve Corps, $226,882,560.

It is clear that the only enlisted men in training for officers that are here given the pay at $100 per month are the enlisted men of the line. The fifth appropriation headed "Signal Corps" provides for the pay of enlisted men and additional pay for length of service, but there is no designation under said sub-

head for pay at any special rate for enlisted men of the Signal Corps in training for officers.

On page 187 of the act there is a provision for the deficiency expenses of the office of the Chief Signal Officer, with the subheading "Signal Service of the Army," said subheading having two provisos. In the first there is set aside for the Aviation Section, for purchases, the sum of $43,450,000. The second proviso sets forth:

> *Provided further*, That of the sum last above mentioned so much thereof as may be necessary shall be available for paying and otherwise providing for such officers of the Officers' Reserve Corps of the Aviation Section of the Signal Corps and such enlisted men of the Enlisted Reserve Corps of the Aviation Section of the Signal Corps as may be called into active service.

It seems clear from the reading of this act and the appropriations for the enlisted men that the sole claim that Rider can make is that his pay shall come out of the pay provided on page 188 under the subheading "Signal Corps: Pay of enlisted men," or out of the pay provided for on page 187 for the officers and enlisted men of the Enlisted Reserve Corps of the Aviation Section of the Signal Corps, which may be called into active service. These are the sole special and particular appropriations, and the only ones in said act of June 15, 1917, for the pay of enlisted men in the Signal Corps or in the Enlisted Reserve Corps of the Aviation Section of the Signal Corps.

Rider can not properly claim that the appropriation under the second subheading "*Enlisted Men of the Line*," on page 188 (which alone provides for pay at $100 per month for enlisted men in training for officers of the Reserve Corps), applies to enlisted men in the Aviation Section of the Signal Enlisted Reserve Corps. This is clear from the reading of the act, since the pay provided in the subheading on page 188 is only the pay for enlisted men of the line. The line of the Army, at the time, consisted of the Cavalry, Infantry, and Artillery, and neither the enlisted men in the Signal Corps, nor of any section of the Signal Enlisted Reserve Corps, were considered or held, nor were appropriations made for them as enlisted men of the line. It is clear, therefore, that the appropriation made in this act "Pay at $100 per month" for enlisted men in training for officers of the Reserve Corps did not provide any pay for enlisted men in the Signal Corps or in the Reserve Signal Corps. Thus, it can not be held, as claimed by Rider, that by the passage of the Act of June 15, 1917, which took effect from its passage, this special pay at $100 per month applied to the enlisted men of the Aviation Section of the Signal Reserve Corps in training for officers. The enlisted men of the Aviation Section of the Signal Reserve Corps, such as Rider, at the time of the passage of this Act of June 15, 1917, were receiving as pay the sum of $49.50. Unless it can clearly be shown that the provision on which Rider relies was intended to apply to the men in the Aviation Section of the Signal Reserve Corps

it must be held that it did not. In regard thereto the only light that can be thrown on the question of the intent of Congress is of very scant aid. The act as originally passed by the House did not contain the provision for the rate at $100 per month; said provision was inserted at the request of the Army officers in an amendment inserted by the Senate; the sole reference to this provision made by or in the House is in Report No. 67 (65th Cong., 1st sess., H. R.), being the conference report.

The statement of the managers on the part of the House set forth that they agreed to certain amendments of the Senate, among others to—

> No. 14. Makes the appropriation for pay of enlisted men of the Army available for payment at the rate of $100 per month to men in training for officers of the Reserve Corps, as proposed by the Senate.

No further comment was made, so far as counsel has been able to discover, in the House.

The amendment was inserted in the Senate by the Committee on Appropriations. The sole reference to this item in the hearings before the Senate is set forth on pages 89 and 90 of the hearings before a subcommittee of the Committee on Appropriations in the following words:

> PAY OF MEN WHILE IN TRAINING CAMPS FOR OFFICERS' RESERVE CORPS.
>
> Maj. PIERCE. There is no language in the bill that would permit us to pay $100 a month, or whatever amount is finally authorized, to

the candidates for commissions during their training in camps. It will be necessary to have a provision to cover that if it is not included in this bill.

Senator SMOOT. Do you mean the authorization to pay them $100 a month?

Maj. PIERCE. Yes. It can not come out of the pay of the Army under the wording of the bill.

Lieut. BRETT. I think we could put in an item on page 12, line 3, under the heading "Enlisted men of the line." These men are to be enlisted.

Maj. PIERCE. Yes; they are to be enlisted for a period of three months only.

Lieut. BRETT. That could be put in on page 12, line 3. I can see it will be necessary to explain. They are not in the essential features enlisted men. They are training for officers. Enlisted men get $30 a month, and it is proposed to give these men $100 a month. This would be "including pay at $100 a month for men training."

The CHAIRMAN. "Training for officers in the Reserve Corps?"

Lieut. BRETT. Yes; in the language that covers that on page 12, line 2, is where the wording comes, so that it will read: "For pay of enlisted men, of all grades, including recruits, and pay at $100 (or whatever amount is authorized) a month for enlisted men in training for officers."

The CHAIRMAN. "For commissioned officers in the Reserve Corps?"

Lieut. BRETT. That is it; yes.

Senator HARDWICK. How much have you to add for that?

Lieut. BRETT. It will not be necessary to add any.

Maj. PIERCE. Have you enough money for that?

Lieut. BRETT. I think so.

Senator HARDWICK. "Including pay, at $100 a month for enlisted men in training for officers of the Reserve Corps?"

Lieut. BRETT. There should be stated the amount that is to be paid each month, "at $100 per month," or whatever the amount should be decided upon.

Senator SMOOT. "At the rate of $100 a month?"

Lieut. BRETT. "At the rate of $100 a month."

Maj. PIERCE. I think we have covered everything, Mr. Chairman.

There was no further discussion of the item in the report to the Senate or in the discussions by the Senate so far as counsel has been able to discover.

It is clear from the reading of this hearing before the Senate subcommittee that in the matter of this item there was no intention to cover the enlisted men of the Aviation Section of the United States Signal Service Reserve Corps who might have been in training for officers. The ordinary private, to whom Lieutenant Brett refers, saying "Enlisted men get $30 a month, and it is proposed to give these men $100 a month," was the ordinary private of the line. Said private received a base pay of $15 and, under the

provisions of the act of May 18, 1917, he received an increase of $15, his total pay thus being $30. The ordinary private of the line, therefore, in training at this time for officer in the Reserve Corps, received as full compensation the sum of $30, and the intent was that this amount which he received should now be increased, temporarily, to the sum of $100.

This was purely a temporary measure to meet the emergency of providing the officers needed for the line for the vast army of recruited and conscripted men who were then in training. It was an emergency and it was felt that the men who were deemed fit and competent to be trained for officers should, during the period of their training, receive a special increase over the pay of the ordinary enlisted men of the line, and it was this pay and increase which was provided for in this specific appropriation. The subsequent appropriation acts during the course of the war contained no such provision, the need and the emergency having ended with the training of the necessary officers for the line during the course of the year 1917–1918.

II.

The second question is: If Rider's pay was fixed by the proviso of the Act of June 15, 1917, at $100 per month, what did said sum include?

The court has held that this item in the Act of June 15, 1917, fixed the base pay of an enlisted man in training for an officer of the Reserve Corps at $100 per month. If the said sum of $100 per month should, on and after June 15, 1917, be paid to private enlisted

men in the same situation as Rider, is the court correct in this position, or did not said $100 cover all amounts to which he would have been entitled provided said act had not become a law?

If the said $100 set forth in the opinion of the court was merely the base pay of the plaintiff, then it took the place of the $18 to which he was entitled under the Act of May 11, 1908 (35 Stat. 190), and the provision for pay at $18 was suspended temporarily and was repealed by implication solely for the period of time when the Act of June 15, 1917, and its appropriations remained in force. Such is the reasoning of the court below. The court held further that the increase in pay which was to be received under the provision of the Act of May 18, 1917 (40 Stat. 82), and which was in the case of a private whose base pay did not exceed $21 per month, that he "shall receive an increase of $15 per month" was also temporarily repealed by implication by the Act of June 15, 1917; but the court below held that the provision of the Act of July 18, 1914 (38 Stat. 516), of an increase of fifty per centum in the case of the aviation enlisted men (that he "shall receive an increase of fifty per centum in his pay,") was not repealed by implication by the passage of the Act of June 15, 1917. It should be noted that none of these three acts nor any part thereof were expressly repealed by the Act of June 15, 1917, and that under the holding of the court the only repeal or suspension of said act that was made, was by implication, and that not permanently, but for the

life of the Act of June 15, 1917, and the appropriations carried by it.

Congress clearly did not intend that this $100 per month was an additional pay to the parties who would benefit by it. It was, therefore, a new rate of pay. What, under the acts to which attention has been called, was the former rate of pay? The former rate of pay for a private, first class, who was not engaged in flight was $33 per month; if engaged in flight duty the private, first class, would receive an increase of fifty per centum in his pay, and his rate of pay in these cases would be increased to $49.50 per month. In either case, whether engaged in flight duty or not, the pay which the private received was the amount which he received; *it can not be held, as the court below held, that in the first instance $33 was his pay, and that in the second instance $49.50 was his pay and something else.* In common, ordinary speech, either sum was his pay—was the amount that he received per month. The acts read "whose base pay does not exceed $21 per month shall receive an increase of $15 per month," and he "shall receive an increase of fifty per centum in his pay." And now Congress sets out in the Act of June 15, 1917, "Pay at the rate of $100 per month for enlisted men, etc." Defendant respectfully submits that it is a violent wresting of the English language and a forced construction of the intent of Congress to declare that the $100 per month would cover the $33, but does not cover the $49.50.

III.

The court below erred in holding that the provision of the act of June 15, 1917, establishing "pay at $100 per month for enlisted men in training for officers of the Reserve Corps," was extended by the provisions of the act of July 24, 1917 (40 Stat. 243), and of July 9, 1918 (40 Stat. 485), until June 30, 1919.

The provision of the act of June 15, 1917, establishing the rate of pay at $100 per month, was clearly not permanent but temporary legislation on the subject. It is clear that with the expiration of the time during which the statute was to be effective and the appropriations to be available, the temporary legislation in regard to the rate of pay would expire.

The provision, as to this rate of pay, is not in the nature of and similar to the frequent provisions found in appropriation bills, increasing or decreasing from the time of the going into effect of the act the pay or allowances of officers or men of the Army or Navy. In these cases the law specifically sets out that "from the passage of this act," or from a date set out in the act, the increase or decrease shall become and be thereafter effective. That is not the case here; there is here the appropriation of a lump sum of $226,882,560. This lump appropriation is to be used for the purpose of "the pay of enlisted men of all grades, including recruits, and pay at $100 per month for enlisted men in training for officers of the Reserve Corps."

It is not necessary to argue to the court that with the expiration of the availability of this appropria-

tion the rate of pay at $100 per month would cease. The second section of the act sets out that the appropriations therein were to be available to June 30, 1918. Unless by subsequent legislation the life of these appropriations was extended, the appropriation which was available to pay the $100 per month ceased to be available on June 30, 1918, and on that date pay at said rate came to an end.

The court below held that the appropriations by later acts were made available until June 30, 1919. The following are the words of the opinion of the court as delivered by Judge Hay:

> The Government contends that the provision of the act of June 15, 1917, which established the pay of the plaintiff at $100 per month, expired with the expiration of the appropriations set forth in the act. We are of the opinion that this contention is not tenable because of the provisions of the act of July 24, 1917, and of the act of July 9, 1918, which latter act makes available the appropriations of the act of July 24, 1917, and of the appropriations of the act of May 12, 1917, until June 30, 1919.

It will be first noted that nowhere, either in the act of July 24, 1917, or in any previous or subsequent act of Congress, with the exception of the provision cited in the act of June 15, 1917, is there any mention of, or reference to, the rate of pay of $100 per month. The act of July 24, 1917 (40 Stat. 243), is entitled "An act to authorize the President to increase temporarily

the Signal Corps of the Army and to purchase, manufacture, maintain, repair, and operate airships, and to make appropriations therefor, and for other purposes." While the act of July 18, 1914 (38 Stat. 514), is the act which originally created the aviation section of the Signal Corps of the Army, yet it is the act of July 24, 1917, which permanently established and provided for the organization of the Aviation Section.

Section 9 of the act gives the authority for the purchase, maintenance, repair, and operation of airships, and the acquiring and building of aviation stations with all necessary appurtenances thereof; for the purchase and manufacture and issuance of clothing, etc.; for vocational training; for traveling expenses at home and abroad; for development of engines, planes, etc.; for the maintenance of manufacturing plants; for aviation technical instruction at schools; and also *for the pay of reserve officers, enlisted men, etc., called into service.* To carry the act into effect, section 10 provides an appropriation of $640,000,000 "to be available until June thirtieth, nineteen hundred eighteen." There is no further or other appropriation made in and by said act.

The act of July 9, 1918 (40 Stat. 845), is the general appropriation act for the support of the Army for the fiscal year ending June 30, 1919. The portion of the act which is noted by the court in its reasoning is the following:

> Continuing the appropriations for the Signal Service: That funds appropriated by the Act approved July twenty-fourth, nineteen hun-

dred and seventeen, for the fiscal year nineteen hundred and eighteen, entitled "An Act to authorize the President to increase temporarily the Signal Corps of the Army and to purchase, maintain, manufacture, repair, and operate airships, and make appropriations therefor and for other purposes," and the funds appropriated for the Signal Service of the Army in the Act approved May twelfth, nineteen hundred and seventeen, entitled "An Act making appropriations for the support of the Army for the fiscal year nineteen hundred and eighteen," and October sixth, nineteen hundred and seventeen, for the fiscal year nineteen hundred and eighteen and prior years entitled, "An Act making appropriations to supply urgent deficiencies and so forth," are hereby made available until June thirtieth, nineteen hundred and nineteen.

The act of July 24, 1917, has already been noted and the funds appropriated under that act have been described. No funds, under said act, provided for the payment at the rate of $100 per month of enlisted men in training for officers of the Reserve Corps. The funds appropriated in the act of May 12, 1917, are set out in 40 Stat., pages 42, 43, and 44. Nowhere in said act and in the appropriations carried by it—said act having been enacted prior to June 15, 1917—is there any, even the slightest, reference to pay at the rate of $100 per month. The act of October 6, 1917, is a deficiency bill for the fiscal year ending June 30, 1918. The appropriations of this act which by the act of July 9, 1918,

were extended and made available until June 30, 1919, are set out in 40 Stat., pages 355, 356. Nowhere in said act is there any mention of the $100 per month rate. In other words, the funds appropriated by these three acts and which by the act of July 9, 1918, were made available until June 30, 1918, contained no item in the appropriations for the payment at the rate of $100 per month. The appropriation, which provided for that rate, being the appropriation made in the act of June 15, 1917, and was not extended by the act of July 9, 1918. The attention of the court is called specifically to the fact that this is so, although the appropriations made for the Signal Service of the Army in the act of May 12, 1917, enacted one month prior, are extended until June 30, 1919.

The further attention of the court is drawn to the fact that the deficiency appropriation bill of October 6, 1917, on page 356, contains appropriations like but not identical with those made on page 188 in the act of June 15, 1917. The appropriation in the act of June 15, 1917, the first deficiency bill of this year, provided:

> Enlisted men of the line: For pay of enlisted men of all grades, including recruits and pay at $100 per month for enlisted men in training for officers of the Reserve Corps, $226,882,560.

The like provision in the act of October 6, 1917, reads:

> Enlisted men of the line: For pay of enlisted men of all grades, including recruits, $250,000,000.

A careful, thorough, and complete reading of each and all of these statutes clearly discloses the fact that the court erred in holding that under the provisions of the act of July 24, 1917, or the act of July 9, 1918, the rate of "pay at $100 per month for enlisted men in training for officers of the Reserve Corps," set out in the act of June 15, 1917, by said acts was extended from June 30, 1918, to June 30, 1919.

JAMES M. BECK,
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JOHN G. EWING,
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FEBRUARY, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
NELSON W. RIDER, APPELLEE.
No. 510.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL AND REPLY BRIEF FOR THE UNITED STATES.

The reasoning of the court is that the act of June 15, 1917, 40 Stat. 188, fixed a rate of pay for enlisted men in training for officers of the Reserve Corps which, like other rates of pay for enlisted men of the Army, could be increased by reason of duties performed—such as flying; and that although specifically applicable only to an appropriation then made which lapsed with June 30, 1918, yet by reason of the fact that another and different appropriation was available for the pay of enlisted men of the Aviation Section of the Signal Enlisted Reserve Corps which continued available to June 30, 1919, the authority to pay enlisted men of the Aviation Section, Signal Enlisted Reserve Corps, in training for

34338—23

officers, at the rate of $100 per month continued to June 30, 1919.

To get a proper perspective of the question it is necessary to go back to the events of 1915, the preparedness parades, etc. It will be recalled that the War Department, on its own initiative and without legislative authority, organized training camps, such as at Plattsburg Barracks, N. Y., where civilians were given military training. There being no statutory authority therefor, persons attending were required to pay either their own transportation to and from camp, were required to buy their uniforms, were required to subsist themselves, and were required to serve without pay.

Legislative authority for camps of this character for the military training of civilians was provided in section 54 of the National Defense Act of June 3, 1916, 39 Stat. 194. Provision was there made for transportation, uniforms, and subsistence—no pay. The Army appropriation act of August 29, 1916, for the fiscal year 1917, 39 Stat. 648, provided funds for future camps and authorized reimbursement for transportation and subsistence to persons who had attended camps ordered by the Secretary of War prior to the act of June 3, 1916. See 23 Comp. Dec. 217.

This was the legislative authority for maintaining training camps for civilians when war was declared April 6, 1917.

Enlisted men of the Regular Army and of the National Guard in Federal service were being sent to

training camps for training to become officers and while there were receiving the pay and allowances of their grades; civilians received only transportation, uniforms, and subsistence. Members of the enlisted reserve corps ordered to active duty for training were on the same footing as to pay and allowances as enlisted men of the Regular Army, and in this class was included the prospective officers of the Air Service, then known as the Aviation Section, Signal Corps. When any of these latter were, in the course of their training, assigned to duty requiring participation in regular and frequent aerial flights they were entitled to an increase of 50 per cent of the pay of their grades. Not so with civilians training under the same conditions of service—they got nothing.

By the Army appropriation act of May 12, 1917, 40 Stat. 69–70, passed after the declaration of war, an appropriation was made of $3,281,000 for civilian military training camps; that is, the training camps authorized by section 54 of the act of June 3, 1916, and it was provided:

> That the Secretary of War is hereby authorized *out of this appropriation* to pay to persons designated by him for training as officers in the Army during the period of their training the sum of not to exceed $100 per month in addition to the allowances authorized by said section fifty-four: *Provided,* That they shall agree to accept appointment in the Officers' Reserve Corps in such grade as may be tendered by the Secretary of War.

This is the only authority or appropriation for the payment of $100 per month to civilians attending training camps. This appropriation for the fiscal year 1918 was supplemented by the deficiency appropriations of June 15, 1917, 40 Stat. 198, October 6, 1917, *id.*, 364; and July 8, 1918, *id.*, 830, so that it was only during the fiscal year 1918 that civilians were authorized to be paid "not to exceed $100 per month." The provision under this head for the fiscal year 1919 will be considered later.

With a view to placing enlisted men in training for officers on the same footing as to pay as civilians in training (many or most of the enlisted men were recently from civil life, large numbers in the National Guard) it was provided in the act of June 15, 1917, in the appropriation of additional funds for pay of enlisted men:

> For pay of enlisted men of all grades, including recruits, and pay at $100 per month for enlisted men in training for officers of the Reserve Corps, $226,882,560.

As this was a deficiency appropriation and as the provision for pay was not permanent law but an authority limited to the appropriation then made, it is clear that it did not authorize pay at that rate beyond the year for which the appropriation was made. The training camps for officers to which this appropriation and authority applied were established by War Department Special Regulations No. 49, and included only training for commissions in the Infantry, Cavalry, and Artillery.

Training camps or schools for the Aviation Section, Signal Corps, were not considered by the Department as training camps for officers; men who satisfactorily completed the course of instruction were recommended by the Chief Signal Officer for commission, but the schools and camps were not included in the training camp plans of the Department as outlined in Special Regulations No. 49. When, however, provision was made for pay at the rate of $100 per month for enlisted men undergoing training for officers the Chief Signal Officer brought to the attention of the Secretary of War the disparity that would exist between the pay of men in training who might eventually be commissioned in the Aviation Section, Signal Reserve Corps, and men in training for commissions in the Infantry, Cavalry, and Artillery. The Adjutant General brought the matter to the attention of the Chief of Staff in a memorandum, published in full at 26 Comp. Dec. 117, and the Secretary of War, July 13, 1917, by approval of the recommendation there made, directed that enlisted men of the Signal Enlisted Reserve Corps admitted to Signal Corps Aviation schools would be considered as designated for training as officers of the Army, and be placed on the same footing as to pay and allowances as enlisted men detailed to training camps for commissions in the Infantry, Cavalry, and Artillery.

Here it is clear that the purpose was not to secure a base pay to which was to be added 50 per cent for flying duty, but a rate of pay for the entire period

of training, and that represented a substantial increase over the amount theretofore paid to enlisted aviation students assigned to flying duty.

It will thus be seen that the sole purpose of the legislation of June 15, 1917, was to secure uniformity in the pay of all persons undergoing training to become officers, whether they were civilians who came into the service for the training or were enlisted men detailed for the training; yet it has never been suggested that a *civilian* in training should receive an increase of 50 per cent of the pay fixed by law when that training included participation in flights. This is fully discussed at 26 Comp. Dec. 746, which see. And see also paragraphs 25 to 28, inclusive, of War Department Special Regulations No. 49, revised to August 15, 1917.

After over a year of war, after a year of the draft act under which practically every able-bodied man from 18 to 31 was subject to military duty, no further necessity existed for offering inducements in the way of pay to civilians to undertake training to become officers, and the Army appropriation act of July 9, 1918, 40 Stat. 876, appropriates only $250,000 for arms and ordnance equipment in connection with training camps; not one cent is appropriated for pay for civilians attending training camps, although such camps were continued to the date of the armistice, November 11, 1918. Civilians were admitted, however, only after enlistment and received no pay over and above their grades as enlisted men. See Special Regulations No. 49, revised to

January 5, 1918, and amended February 5, 1918, paragraph 2; and mimeographed regulations of June 27, 1918.

These regulations contain the contemporaneous departmental construction of legislation, perhaps drafted by it; certainly passed at its suggestion. This was the basis on which the training camps were organized and conducted and this was the understanding of the committee of Congress having the legislation in charge in making the appropriation for the fiscal year 1919.

The statutes, regulations, and the decisions of Comptroller of the Treasury applicable are:

Act of June 3, 1916, 39 Stat. 194–195;
Act of August 29, 1916, 39 Stat. 648;
Act of May 12, 1917, 40 Stat. 69–70;
Act of June 15, 1917, 40 Stat. 188 and 198;
Act of October 6, 1917, 40 Stat. 364;
Act of July 8, 1918, 40 Stat. 830;
Act of July 9, 1918, 40 Stat. 876;
Act of July 11, 1919, 41 Stat. 128;
Act of June 5, 1920, 41 Stat. 974;
23 Comp. Dec. 217;
26 Comp. Dec. 116 and 745;
War Department Special Regulations No. 49, 1st edition, not in library;
War Department Special Regulations No. 49, 2nd edition, in library;
War Department Special Regulations No. 49, 3rd edition, in library;
Mimeograph Regulations June 27, 1918; not in library.

To summarize: It was only by the action of the Secretary of War of July 13, 1917, that men of the Aviation Section, Signal Enlisted Reserve Corps, in training were brought within the act of June 15, 1917, see 26 Comp. Dec., 116; the purpose of the act was to equalize the pay of enlisted men and civilians undergoing training during the fiscal year 1918; civilians in training for the Air Service could in no circumstances be paid more than $100 per month, the only pay provided by law for them; by reason of the draft act no provision was made for pay for either civilians or enlisted men in training for officers after July 1, 1918; and as the provision for increased pay for enlisted men in training for officers lapsed with June 30, 1918, the mere availability of the Aviation appropriation beyond that date is not authority for the payment of the increased amount in only that one branch of the service after that date.

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FEBRUARY, 1923.

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APPELLEE'S

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 510.

THE UNITED STATES OF AMERICA,
APPELLANT,

vs.

NELSON W. RIDER, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

Statement.

The appellee, Nelson W. Rider, was an enlisted man of the Aviation Section of the Signal Enlisted Reserve Corps in training for officer of the Reserve Corps, otherwise called Air Service Cadet, United States Army, during the period from February 9, 1918, to September 13, 1918.

He was in training in the aviation ground course at the School of Military Aeronautics, Urbana, Ill., from February 9 to April 6, 1918, and at Camp Dick, Texas, from April 11 to May 9, 1918. He was ordered to Taylor Field, Alabama, on May 9, 1918, and reported there on May 12, 1918. From May 12, 1918, to September 13,

1918, he was on duty requiring regular and frequent participation in aerial flights at Taylor Field.

From February 9, to June 30, 1918, claimant was paid $100 per month, with no increase of pay during the period he was engaged upon flight duty. From July 1 to September 13, 1918, plaintiff was paid $33 per month plus 50 per centum increase thereon for flight duty, or $49.50 per month.

Claimant commenced active duty under his enlistment in training for commission at the School of Military Aeronautics, at Urbana, Ill. He pursued the course of studies at the School of Military Aeronautics from February 9 to April 6, 1918. The subjects of that course were: Military Studies, Signalling, Gunnery, Aids to Flight, Airplanes, Engines, Aerial Observation. All this was before he was instructed in the art of flying; it was entirely ground duty.

His flight duty did not begin until he was graduated from the School of Military Aeronautics. He was some time after graduation assigned to duty requiring regular and frequent participation in aerial flights at Taylor Field, a flying field. He flew almost daily one or more times in an airplane. It was shown at the trial that flight duty was performed of a most awesome peril.

ARGUMENT.

The Act of June 15, 1917, 40 Stat., 182, 188, "An Act making appropriations to supply urgent deficiencies in the appropriations for the military and naval establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," provides:

> "For pay of enlisted men of all grades, including recruits, and pay at $100 per month for enlisted men in training for officers of the Reserve Corps, $226,882,560."

By section 2 of the above act, the appropriations therein are made available to June 30, 1918.

I.

Act of June 15, 1917, Applies To All Enlisted Men of the Army in Training for Officers of the Reserve Corps.

Counsel for the United States now makes the contention that the language "enlisted men in training for officers of the Reserve Corps" in the foregoing provision in the Act of June 15, 1917, includes only the enlisted men of the line of the army, and that therefore the provision is not applicable to enlisted men of the Aviation Section in training for officers of the Reserve Corps.

This contention is made in the face of the fact that the administrative officers of the Government have construed the provision to apply to aviation enlisted men in training for officers of the Reserve Corps.

It is made in the face of the fact that the claimant has already been paid by the Government for the period he was in training for commission as aviation enlisted man at $100 per month in accordance with the terms of his enlistment, during the period that appropriations were available by the Act of June 15, 1917, for enlisted men in training for officers of the Reserve Corps.

It is now contended by counsel for the United States that the provision is limited to enlisted men of the line because of the sub-heading "PAY OF ENLISTED MEN OF THE LINE" of the heading "PAY OF THE ARMY."

A reading of the committee hearing set out in the Government's brief shows that the provision was proposed and accepted for the purpose of taking care of enlisted men generally in training for officers of the Reserve Corps. It was inserted at what was considered a con-

venient place in the statute, the language used being broad enough to cover enlisted men of all branches in such training. The committee was told that without a provision of this kind under pay of the army no enlisted man could be paid any special rate while in training for a commission. To restrict its application to enlisted men of the line merely because of its juxtaposition to a sub-heading, and that is the only reason advanced by the Government for such a construction, would violate not only the language used but the obvious legislative intent. The contention of Government counsel is contrary to the elementary rule of statutory construction that general words in a statute "are to have a general operation unless the manifest intention of the legislature affords grounds for qualifying or restraining them."

The court may take judicial notice of the provision of the Act of July 9, 1918, 40 Stat., 849, declaring that after that date "no person otherwise qualified for service as cadet . . . in the aviation service shall be debarred from such service by reason of not being equipped with a college education," as evidence of the fact that Air Service Cadets were picked men of very high qualification. They were picked after very exacting physical examination from college graduates of the country who volunteered for the risk, hazard and peril of flight duty during the war.

Congress could not reasonably have intended merely to allow enlisted men of the infantry, cavalry, and artillery $100 per month while in training for officers of the Reserve Corps and deny it to aviation enlisted men in such training.

Air Service Combatant Arm or Line of the Army.

The line of the army is the fighting portion of the military service. Wilhelm's Military Dictionary (1881)

p. 280. While years ago the line may have consisted only of the infantry, cavalry, and artillery, nevertheless, at least since the beginning of the World War because of the modern conditions of warfare, the line of the Army has come to include other arms of the service; notably, the Air Service. There can be no question that flying men of the Aviation Section were essentially combatant forces and operated as fighting men directly employed in battle. It may be said that the Air Service was the most hazardous and perilous fighting branch of the military service, with constant risk and sacrifice of life not only in combat and battle but at all times.

Under the authority of the Acts of May 18, 1917, 40 Stat., 182; July 24, 1917, 40 Stat., 243; and May 20, 1918, 40 Stat., 556; the President directed the organization of the Air Service, comprising the aviation section of the Signal Corps. (See note under heading Air Service, in Military Laws of the United States, Annotated, 6th Edition, 1921, p. 391.)

In Changes, Army Regulations, No. 73, War Department, June 10, 1918, para. 1575, this appears:

> "1575. The Chief of Air Service will be charged, under direction of the Secretary of War, with the command of the Air Service, both staff and line. . . ."

There is no statute anywhere so far as counsel can discover that designates the line of the Army until the Act of June 4, 1920, 41 Stat., 759, which by Section 2 provides:

> "Composition of the Regular Army.—The Regular Army of the United States shall consist of the Infantry, the Cavalry, the Field Artillery, the Coast Artillery Corps, the Air Service, the Corps of Engineers, the Signal Corps, which shall be designated as the combatant arms or the line of the Army. . . ."

It is clear from the above facts and the reading of the regulation and law declaratory thereof that aviation enlisted men were for the whole period of the national emergency enlisted men of the line.

Section 8, of the Act of July 24, 1917, 40 Stat., 243, is to be noted which provides:

> "That all officers and enlisted men of the temporary forces of the Signal Corps, including the aviation section thereof provided for herein, shall be in all respects on the same footing as to pay, allowances and pensions as permanent officers and enlisted men of corresponding grades and length of service in the Regular Army."

This Act enacted subsequent to the approval of the Act of June 15, 1917, confers upon the enlisted man of the Aviation Section in training for an officer of the Reserve Corps the same rate of pay as that allowed enlisted men of the Army likewise engaged, $100 per month.

II.

Claimant Entitled to 50 Per Cent Increase in His Pay.

The Act of July 18, 1914, 38 Stat., 514, 516, "An Act to increase the efficiency of the aviation service of the Army, and for other purposes," provides:

> "That twelve enlisted men at a time shall, in the discretion of the officer in command of the aviation section, be instructed in the art of flying, and no enlisted man shall be assigned to duty as an aerial flyer against his will except in time of war. Each aviation enlisted man, while on duty that requires him to participate regularly and frequently in aerial flights, or while holding the rating of aviation mechanician, shall receive an increase of 50 per centum in his pay."

The above is amplified by the Act of June 3, 1916, 39 Stat. 175.

The Act of June 3, 1916, The National Defense Act, by the second proviso of section 13, provides:

> "That the Secretary of War shall have authority to cause as many enlisted men of the Aviation Section to be instructed in the art of flying as he may deem necessary."

The Army Regulation, Paragraph 1342½, Changes Army Regulations No. 73, War Department, June 10, 1918, is set forth in plaintiff's petition (Rec., p. 2).

Prior to the Act of July 18, 1914, above, increases were provided by law for officers of the Signal Corps on aviation duty. The Act of July 18, 1914, is the first that enjoined flight duty on enlisted men. It provides, however, that an aviation enlisted man shall not be required to perform flight duty against his will, except in time of war. It is likewise the first act in which increase in pay for aviation flight duty is provided for enlisted men for the risk, hazard and peril of that duty.

In brief the Act of July 18, 1914, provides for flying increase in pay as follows:

Aviation Officers:

Military Aviators.
Rank, pay and allowances of one grade higher, and increase of 75 per cent in pay.

Junior Military Aviators.
Rank, pay and allowances of one grade higher, and increase of 50 per cent in pay.

Aviation Students.
Increase of 25 per cent in pay.

Aviation Enlisted Men:

Flyers.
Increase of 50 per cent in pay.

Mechanicians.
Increase of 50 per cent in pay.

Aviation student officers mentioned in the chart, were instructed in the art of flying together with the cadets.

It is to be noted that the Act of July 18, 1914, relates to the Signal Corps of the United States Army, and more especially to the Aviation Section thereof. It is apparent that the provision refers to aviation enlisted men apart from enlisted men of other branches of the Army. It deals exclusively with officers and enlisted men of the Aviation Section of the Signal Corps and singles out soldiers of that branch of the army for flight duty.

On the other hand, the Act of June 15, 1917, in the provision for pay at $100 per month, deals with all enlisted men in training for officer in the Reserve Corps. It deals with enlisted men generally.

The aviation increase provision of the Act of July 18, 1914, not only deals specifically with aviation enlisted men exclusive of enlisted men of other branches of the Army, but it singles out the aviation enlisted men on duty that requires participation regularly and frequently in aerial flights.

So the aviation enlisted man on duty that requires regular and frequent participation in aerial flights should receive for the risk, hazard and peril of that duty what the law provides, viz. increase of 50 per centum in his pay. Congress did not repeal the Act of July 18, 1914, which so provides by the Act of June 15, 1917, in the provision for pay at $100 per month for enlisted men in training for officer of the Reserve Corps.

Ruling Case Law, 25 R. C. L., 169, says:

> "Repeals by implication are not favored, and will not be indulged if there is any other reasonable construction. The presumption is always against the intention to repeal where express terms are not used, and the implication, in order to be operative, must be necessary. A law is not repealed by a later enactment, if the provi-

> sions of the two laws are not irreconcilable nor necessarily inconsistent, but both may stand and be operative without repugnance to each other. Nor can one act be allowed to defeat another, if, by a fair and reasonable construction, the two can be made to stand together. Although two acts are seemingly contradictory or repugnant, they are, if possible by a fair and reasonable interpretation, to be given such a construction that both may have effect."

The following from Black on Interpretation of Laws, p. 116, is quoted with approval by this court in Rodgers *vs.* the United States, 185 U. S., 83:

> "As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all."

In its nature the aviation increase provision can not operate alone, and the provision for pay is the very thing in harmony with its operation and indeed necessary for its computation. (See 25 Comp., Dec. 63.)

Thus it is clear that the provision for flying risk increase in pay of aviation enlisted men of the Act of July 18, 1914, is not repealed by the provision of the Act of June 15, 1917, for pay at $100 per month for enlisted men in training for officers of the Reserve Corps.

III.

Pay of Aviation Enlisted Men at $100 per Month Extended to June 30, 1919.

On the day following June 30, 1918, while claimant was in the performance of his duties, while still in training for a commission, without any change in the nature of his duties, while in the performance of aerial flights in an airplane, and without any change whatsoever except the change on the pay roll, his pay was cut to $33 per month.

After June 30, 1918, he received pay at $33 per month. Also he has been paid 50 per cent increase therein as aviation enlisted man on flight duty.

The Act of June 15, 1917, above, prescribes the pay of an enlisted man in training for commission in the Officers Reserve Corps at $100 per month.

Claimant relies upon the Act of June 15, 1917, in so far as its prescribes pay at $100 per month to enlisted men in training for commission and upon the Act of July 24, 1917, in sections 8, 9 and 10 as supplemental:

> "Sec. 9. That during the existing emergency authority is given the President, through the War Department, for the purchase . . . of airships. . . . And also to pay and otherwise provide for . . . such enlisted men of the Enlisted Reserve Corps of the Aviation Section of the Signal Corps as may be called into active service and such enlisted men as may be enlisted in the Aviation Section of the Signal Corps under the provisions of section 2 of the act to increase temporarily the military establishment of the United States, approved May eighteenth, nineteen hundred and seventeen, or any subsequent act temporarily increasing the commissioned or enlisted personnel of the Aviation Section of the Signal Corps. . . . : Provided, That hereafter all . . . enlisted men

> of the Aviation Section of the Signal Corps shall be paid by Quartermaster disbursing officers from funds transferred to their credit from Signal Corps appropriations.
>
> "Sec. 10. That for the purpose of carrying this act into effect the sum of $640,000,000 is hereby appropriated out of any funds in the Treasury not otherwise appropriated, to be available until June thirtieth, nineteen hundred and eighteen."

Claimant insists that the rate of pay at $100 per month prescribed in the Act of June 15, 1917, is authorized for the then existing emergency by the Act of July 24, 1917, for pay of aviation enlisted men in training for commission. By the provisions of sections 8, 9, and 10 of the latter act, his rate of pay at $100 per month prescribed by the Act of June 15, 1917, was drawn and transferred into the Act of July 24, 1917, and was payable from the appropriations therein.

Section 8 of the latter is again to be noted, which provides:

> "That all officers and enlisted men of the temporary forces of the Signal Corps, including the aviation section thereof provided for herein, shall be in all respects on the same footing as to pay, allowances and pensions as permanent officers and enlisted men of corresponding grades and length of service in the Regular Army."

The provision for pay in section 9 of the same act, while general as to rates, is specific as to aviation enlisted men. The provision for pay at $100 per month in the Act of June 15, 1917, while specific as to rate, is general as to enlisted men of all branches. The more specific therefore is that giving authority during the existing emergency to pay and otherwise provide for aviation enlisted men. As a matter of elementary law, it is therefore supplemental in respect to the rate of pay at $100

per month prescribed by the Act of June 15, 1917, which merges into the authority to pay the existing rates of pay. Section 9 of the Act of July 24, 1917, also provides that thereafter aviation enlisted men be paid out of Signal Corps appropriations. Hence aviation enlisted men should receive the rate of pay prescribed for service in training for commission out of Signal Corps appropriations as long as the authority to pay and provide for them by the Act of July 24, 1917, continued, which was for and during the existing emergency.

The Act of July 9, 1918, 40 Stat., 845, already referred to in regard to qualifications of the cadet of the Air Service, is again to be noted. It is entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1919," and on p. 849 and 850, provides:

> "*Continuing the Appropriations for the Signal Service.*—That funds appropriated by the act approved July twenty-fourth, nineteen hundred and seventeen, for the fiscal year nineteen hundred and eighteen, entitled 'An Act to authorize the President to increase temporarily the Signal Corps of the Army . . . and make appropriations therefor and for other purposes,' and the funds appropriated for the Signal Service of the Army in the Act of May twelfth, nineteen hundred and seventeen entitled 'An Act making appropriations for the support of the Army for the fiscal year nineteen hundred and eighteen,' . . . are hereby made available until June thirtieth, nineteen hundred and nineteen."

The Act of May 12, 1917, 40 Stat., 40, 42, referred to in the above together with the Act of July 24, 1917, provides:

> "That of the sum ($10,800,000) last above mentioned so much thereof as may be necessary will be available for paying and otherwise provid-

ing for such officers of the Officers Reserve Corps of the Aviation Section of the Signal Corps and such enlisted men of the Enlisted Reserve Corps of the Aviation Section of the Signal Corps as may be called into active service."

See also Joint Resolution of July 8, 1918, 39 Stat., 843, Chap., 140, by which all appropriations for the support of the Army in effect June 30, 1918, are extended to July 9, 1918.

The claimant continued to perform the duty of Air Service Cadet after June 30, 1918. He has received base pay to that date at the rate of $100 per month; and after that date at the rate of $33 per month. Congress continued Signal Service appropriations by the Act of July 9, 1918, to June 30, 1919, and thereby extended the basic rate of $100 per month for aviation enlisted men in training for commissions. No other rate had been established for this class of enlisted men, and it does not appear that there was any intention on the part of Congress to repeal the provision fixing the pay of enlisted men in training for officers of the Reserve Corps. Despite this fact, at the very height of the war period, the base pay of the claimant was reduced by the administrative officers from $100 to $33 per month. As the Court of Claims well says: "It is hardly possible to conceive that Congress would at the height of the emergency, while the war was going on, reduce the pay which had been held forth as an inducement to the young men of the country to enter into training for officers in the Reserve Corps."

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February, 1923.